No. 06-825

Supreme Court, U.S.
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In The
Supreme Court of the United States

STARLETTA L. BANKS,

Petitioner,

v.

JENNIFER GRANHOLM, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI ON BEHALF OF RESPONDENTS, ANNAMARIA CHURCH, VINCENT PALUSCI, AND THOMAS SLOVIS

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OBJECTIONS TO PETITIONER'S QUESTIONS PRESENTED

These Respondents submit that Ms. Banks has improperly framed the relevant questions presented for review. Drs. Slovis, Church and Palusci hereby object to Ms. Banks' questions presented contained in her *Petition for Writ of Certiorari*, except for numeral 2 of her Questions Presented, which at least arguably sets forth, the relevant inquiry at issue in this case, i.e., whether her claim was untimely filed.

The issue is not whether Ms. Banks was "injured" under 42 USC § 1983 [Petition, Questions Presented 1], nor does it involve any inquiry into Ms. Banks' appeals from the state court's termination of her parental rights to the Michigan Court of Appeals or the Michigan Supreme Court and the propriety of the procedure followed in the state courts. Ms. Banks did not appeal the disposition of her child protective proceedings in federal court on the basis of alleged violations of her federal constitutional rights following the Michigan Supreme Court's denial of her application for leave to appeal. To the contrary, she filed suit in federal district court some two years after that late date alleging a "conspiracy" by the State of Michigan to fraudulently misappropriate federal funding earmarked for programs aimed at the protection and aid of abused and neglected children.

Ms. Banks' attempt to re-litigate the state court child protective proceedings via the instant petition is misplaced. Significantly, the issues regarding the "parent/agency agreement" [Petition, Questions Presented 3, 4, and 5] which Ms. Banks raises in her petition were not

OBJECTIONS TO PETITIONER'S QUESTIONS PRESENTED – Continued

raised at all in the courts below. Similarly, Ms. Banks did not raise the issue of the lawfulness of the alleged adoption of her children while her state law appeal was pending in either court below [Petition, Questions Presented 7] The sole issue under the circumstances is the propriety of the District Court's dismissal of Ms. Banks' complaint on the grounds of untimeliness and the Sixth Circuit's decision to affirm the district court on the grounds that Ms. Banks failed to comply with the relevant statutes of limitations in filing her claim.

Ms. Banks has only alleged that the lower courts have erred in their factual findings and misapplied properly stated rules of law. Despite her assertion, as explained more fully below, the lower courts did not misapply the law nor err in their factual findings. Moreover, Ms. Banks' petition does not establish that the courts below departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court as to call for an exercise of the United States Supreme Court's supervisory power; nor that the Sixth Circuit's decision is in conflict with another circuit's decision on the same matter; nor that the Sixth Circuit has decided an important question of federal law that has not been settled or that conflicts with relevant decisions of the United States Supreme Court. Rule 10(a) and (c). Therefore, granting of Ms. Banks' Petition for a writ of certiorari is not warranted by the circumstances.

LIST OF PARTIES

STARLETTA L. BANKS,

Petitioner,

v.

JENNIFER GRANHOLM, in her official, corporate and individual capacity. MICHAEL COX, in his official, corporate and individual capacity, RICHARD KAROUB, in his official, corporate and individual capacity, ANNAMARIA CHURCH, in her official, corporate and individual capacity, VINCENT PALUSCI, in his official, corporate and individual capacity, THOMAS SLOVIS, in his official,corporate and individual capacity, MARIANNE UDOW, in her official, corporate and individual capacity, JUDY HARTSFIELD, in her official, corporate and individual capacity, KATHLEEN JANSEN, in her official, corporate and individual capacity, HILDA GAGE, in her official, corporate and individual capacity TED FORREST, in his official, corporate and individual capacity, PATRICIA CAMPBELL, in her official, corporate and individual capacity, and DOES 1-1000,

Respondents.

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INTRODUCTION

Respondents, Dr. Slovis, Dr. Church and Dr. Palusci respectfully submit that Petitioner (Ms. Banks) has failed to articulate a compelling reason for the United States Supreme Court to grant her request for a writ of certiorari. Not only has she failed to articulate a reason that fits generally within the guidelines of subsections (a)-(c) of Rule 10, *supra,* but she has also failed to plead any other compelling reason warranting review by this Court.

STANDARD OF REVIEW

Rule 10 of the *Rules of the Supreme Court of the United States* states that "[a] petition for writ of certiorari will be granted only for compelling reasons . . . [a] petition for writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

STATEMENT OF THE CASE AND STATEMENT OF FACTS

Petitioner filed a Complaint in this matter on June 6, 2005 alleging numerous federal statutes were violated, including 42 U.S.C. § 1983 and 18 U.S.C. § 1962. She alleged the State of Michigan, by its elected officials or employees, and others violated her rights by kidnapping her children on October 21, 1998. [R. 1 Complaint ¶ 23] The child custody proceedings, to which Petitioner refers, resulted in an Order terminating her parental rights on January 12, 2001. [R. 1 Complaint ¶ 29] Petitioner's claims are that state procedures were abused or misused or that

state officials abused their positions of authority when her children were removed from her custody and her parental rights were ultimately terminated. [R. 1 Complaint ¶ 22]

Respondents, Annamaria Church, M.D., Vincent Palusci, M.D., and Thomas Slovis, M.D., are not employees or elected officials of the State of Michigan. Respondent Church was a staff pediatrician and a forensic child abuse expert at Henry Ford Hospital, Detroit, Michigan, in October, 1998. Plaintiff alleged that Dr. Church initiated a report to Child Protective Services regarding suspected child abuse of one of appellant's children. [R. 1 Complaint ¶ 23] Dr. Church also testified in the custody proceedings. [R. 1 Complaint ¶ 30] In October, 1998, Respondent Slovis had medical staff privileges at Children's Hospital of Michigan in Detroit, Michigan, where he worked as a radiologist. It appears the only allegation against him is that he may have participated in a radiologic study relating to Petitioner or her children and may have testified in the child custody proceedings involving Petitioner. [R. 1 Complaint ¶ 24] Respondent Palusci is not alleged to have had any participation in the child custody proceedings involving Petitioner, at all. Rather, the sole allegation against him is that he was associated with DeVos Children's Hospital in Grand Rapids, Michigan, is somehow associated with the Children's Trust Fund and works with Dr. Church at DeVos Children's Hospital. [R. 1 Complaint ¶ 34, 47] It should be noted that Petitioner is alleged to be a resident of Detroit, Michigan. [R. 1 Complaint ¶ 7]

Respondent Slovis answered the Complaint. [R. 6] Respondents Church and Palusci's request for an extension to answer the Complaint was granted by the Court by its Order of July 15, 2005. Their answer was not due to be filed until August 3, 2005. [R. 20]

Meanwhile, a Motion to Dismiss was filed on June 28, 2005 by Defendants Judy Hartsfield, Kathleen Jansen, Hilda Gage, Ted Forrest, Jennifer Granholm, Richard Karoub and Marrianne Udow (the "State Defendants"). It asserted the Complaint was barred by the applicable statute of limitations. [R. 8]

The district court granted the motion by its Opinion and Order on July 27, 2005 and dismissed the case in its entirety on that date. [R. 21 and 23]

Petitioner filed a Request for Reconsideration of the dismissal on August 5, 2005. [R. 24] She also filed a Motion to Vacate on August 25, 2005. The district court entered its Order denying both requests on September 28, 2005. [R. 31]

Petitioner filed a Notice of Appeal as to the dismissal on August 25, 2005. [R. 26] Petitioner also filed a Request for Clerk's Entry of Default in the district court on September 28, 2005 [R. 34 and 35] Respondents Church and Palusci filed a response to that request. [R. 33] A notice of denial of clerk's entry of default was entered on October 4, 2005. [R. 36] No notice of appeal was filed from that denial.

The Sixth Circuit Court of Appeals issued its Order affirming the district court's dismissal of the Complaint on June 19, 2005. [Petition, Appendix A] Petitioner filed a Motion for Reconsideration and a Motion for Recusal and for removal of the Michigan Attorney General as counsel in the appeal. Those requests were denied by Order of the Sixth Circuit on September 11, 2005. [Petition, Appendix D] This Petition for a Writ of Certiorari ensued.

SUMMARY OF ARGUMENT

I. The Complaint was properly dismissed on the basis of the Statute of Limitations. Considering either the three-year statute applicable to claims under 42 U.S.C. § 1983 or the four-year statute of limitations applicable to 18 U.S.C. § 1962 (RICO) claims, the case was untimely filed. Under either theory, the cause of action accrued when Petitioner alleged that her children were "kidnapped" on October 21, 1998. Even construing the Complaint liberally, as the district court did, it is clear the last action complained of occurred on January 12, 2001, when the custody proceedings resulted in an order terminating Petitioner's parental rights. Subsequent appeals from that order do not toll the statute of limitations. The Complaint was filed on June 6, 2005, nearly four and one half years after that date, and is barred by the statute of limitations.

II. Even if the Complaint was considered to have been filed timely as to the RICO claim, it was properly dismissed under Fed. R. Civ. P. 12(b)(6) for the reason that it failed to state a valid claim for relief. The Complaint made only conclusory allegations of a "pattern of racketeering activity" without alleging facts sufficient to state a valid claim for relief under that provision.

III. Finally, the dismissal of the entire case on motion by some, but less than all the defendants, was appropriate because the basis for the dismissal was equally appropriate as to all the defendants. As to the attempted default of Respondents Church and Palusci, two further points are clear. First, there was no notice of appeal filed as to that request, so it is not before the court. Secondly, they were not in default. By Order of the court, their answers were

not due until August 3, 2005. The entire case was dismissed on July 27, 2005.

ARGUMENT

I. THE COMPLAINT WAS PROPERLY DISMISSED ON THE BASIS OF THE EXPIRATION OF THE STATUTE OF LIMITATIONS PRIOR TO ITS FILING.

Even though the Petitioner's Complaint contains many counts, the Sixth Circuit correctly addressed the substance of her claims: 42 U.S.C. § 1983 and 18 U.S.C. § 1962 (civil RICO) in its *de novo* review of the dismissal under Rule 12(b)(6) of the Complaint.[1] The Complaint was untimely filed under either theory.

When Congress enacted 42 U.S.C. § 1983, no statute of limitations was included. *Wilson v. Garcia*, 471 U.S. 261, 266, 105 S. Ct. 1938 (1985). It is well settled that state law will supply the statute of limitations for § 1983 claims, but federal law will determine when a federal claim accrues. *Sevier v. Turner*, 742 F.2d 262, 272 (6th Cir. 1984). The statute of limitations for filing a § 1983 claim in Michigan is three years. Mich. Comp. Laws § 600.5805(10); *Wolfe v. Perry*, 412 F.3d 707 (6th Cir. 2005). A claim accrues under § 1983 when the plaintiff "knows or has reason to know" of

[1] For example, Petitioner asserted 21 counts of alleged violations of federal criminal statutes. As a general rule, there is no private right of action based on violation of federal criminal statutes. *Central Bank of Denver v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114 S. Ct. 1439, 128 L. Ed. 2d 119 (1994). See also, *Ryan v. Ohio Edison Co.*, 611 F.2d 1170 (6th Cir. 1979); *Morganroth & Morganroth v. DeLorean*, 123 F.3d 374 (6th Cir. 1997).

the injury which is the basis of her action. *Sevier v. Turner*, 742 F.2d at 273. The statute of limitations begins to accrue when the plaintiff has knowledge of the injury so a claim will not be extended indefinitely to defeat the purpose of the statute of limitations. *Id.* at 273.

The Complaint alleges Petitioner's children were taken into protective custody by the State of Michigan on October 21, 1998. Thus, on October 21, 1998, Petitioner had knowledge of, or should have known of, her injury. Therefore, this is when the statute of limitations accrued. Petitioner filed this Complaint on June 6, 2005, almost seven years after the three-year statute of limitations had accrued.

The district court observed that the case was time-barred even if the Complaint was liberally construed so that the accrual date was the date of the order granting full custody of her children to her grandparents, i.e., January 12, 2001.

Petitioner asserts that the accrual date should have been postponed until the conclusion of the state court appeals. Thus, she contends that her cause of action did not accrue until April 29, 2003, when the Michigan Supreme Court denied her motion for reconsideration of her earlier untimely application for leave to appeal. However, her position is unfounded. Her subsequent state court appeal of the order terminating her parental rights did not prevent or delay the accrual of her claim based on the allegedly unconstitutional interference with her parental rights. As the Sixth Circuit observed in its June 19, 2006 Order in this case:

> Moreover, a plaintiff is not entitled to toll the statute of limitations in a § 1983 action during

> the time a related state court action is pending unless provided for by state tolling rules. *Board of Regents of University of State of N. Y. v. Tomanio*, 446 U.S. 478, 490-91 (1980). Finally, a plaintiff can file a § 1983 claim in federal court without first resorting to state judicial remedies. *Id.* [Petition, Appendix A, p. 3]

The court went on to note that Petitioner had not asserted that the statute of limitations should be tolled under Michigan law. *Id.* Indeed, there is no such tolling provision. See, Mich. Comp. Laws § 600.5856.

In *Kurzawa v. Mueller*, 545 F. Supp. 1254 (E.D. Mich. 1982), *aff'd*, 732 F.2d 1456 (6th Cir. 1984), an action was brought under § 1983 arising from the termination of parental rights in a Michigan probate court. As in this case, the plaintiff-parents asserted their cause of action accrued when the appellate proceedings concluded rather than when their parental rights were terminated in the state court proceedings. The district court determined that the complaint was barred by the statute of limitations. In so ruling, the court reasoned that since the plaintiffs' claim was for the loss of the custody of their child without due process of law, then the latest date when they knew or should have known of the injury which was the basis for their claim was the date on which the state probate court terminated their parental rights. Since the case was filed more than three years after that date, it was barred by the statute of limitations. *Id.*, 545 F. Supp. at 1260.

The Sixth Circuit affirmed, but also held the physician defendants that examined the child as part of the proceedings were entitled to immunity. *Id.*, 732 F.2d at 1458.

Specifically, the contention that accrual of a § 1983 claim is delayed until the completion of the state court appellate proceedings was rejected in *Kurzawa v. Mueller, supra*. See, also, *Roberson v. Tennessee*, 399 F.3d 792, 794 (6th Cir. 2005). In *Roberson*, a § 1983 claim by a medical school student accrued when promotions committee recommended he not be readmitted to school, not when that determination was formally accepted. He was aware of an alleged denial of rights as of the earlier date. The same is true in the instant case.

Petitioner's Complaint alleges that her children were "kidnapped" by the police on October 21, 1998, when they came to her house without a warrant but with a petition from Child Protective Services. [R. 1 Complaint ¶ 23] In addition to the interference with her parental rights, she alleges that she was forced to attend many court hearings which hindered her ability to work and led to the loss of her employment in 1998-1999. [R. 1 Complaint ¶ 28] Further, she alleges that "[o]n January 21, 2001, the court granted full custody of plaintiff's children to plaintiff's parents . . . " [R. 1 Complaint ¶ 29] Under any conceivable interpretation of her allegations, the removal of one's children from the family home and court-ordered termination of parental rights are events " . . . that should have alerted the typical lay person to protect his or her rights." *Trezbuckowksi v. City of Cleveland*, 319 F.3d 853, 856 (6th Cir. 2003). She plainly knew of the injury alleged, i.e., interference with her constitutional right to custody of her children, by at least January, 2001 when the state court terminated her custodial rights. The appellate proceedings did not affect the accrual of her cause of action based upon the unconstitutional termination of her parental rights. *Kurzawa, supra*. Even if the state appellate courts had

reversed the probate court and restored her parental rights and custody, her claims had already accrued as the alleged injury occurred no later than January 12, 2001.

As to the 18 U.S.C. § 1962 (civil RICO) claim, it is clear that it is time barred for the same reason the § 1983 claim is barred, although the limitations period for a RICO claim is four years, not three. *Agency Holding Corp. v. Malley-Duff Assoc. Inc.*, 483 U.S. 143, 156, 107 S. Ct. 2759, 97 L. Ed. 2d 121 (1987). The Sixth Circuit so ruled in its Order affirming the district court dismissal. It held that Petitioner failed to file the Complaint within four years of when she knew or should have known about her claim. [Petition, Appendix A, p. 4] In so ruling, it relied on *Rotella v. Wood*, 528 U.S. 549, 120 S. Ct. 1075, 145 L. Ed. 2d 1047 (2000).

In *Rotella*, the court determined that a RICO claim accrues when the plaintiff knows or should have known of the injury for which the claim is made. *Id.* 528 U.S. at 553. Accrual of a RICO claim is not dependent upon discovery of a pattern of racketeering by the plaintiff. The court reasoned that such a delay in the accrual of the statute of limitations for RICO claims would undercut policies surrounding the purposes of the limitations of actions, including the elimination of stale claims and the need for certainty as to a plaintiff's opportunity for recovery and a defendant's potential liabilities. *Id.* 578 U.S. at 555. In *Rotella*, the plaintiff alleged that a group of doctors and their related business entities were improperly conspiring to admit, treat, and retain him at Brookhaven Psychiatric Pavilion for reasons related to their own financial interests rather than the patient's psychiatric condition in violation of civil RICO laws. Rotella was discharged from Brookhaven Psychiatric Pavilion in 1986, but failed to bring his RICO claim until 1997. He sought to justify his

tardy lawsuit by pointing to a circumstance where a Brookhaven director pleaded guilty to criminal fraud perpetrated through improper relationship and illegal agreements between the company and its doctors in 1994. The court determined his claim was nevertheless barred by the statute of limitations. The court reasoned that Rotella had discovered his injury in 1986 and could have made an investigation to discover the alleged racketeering. The four-year statute of limitations began to run when he was discharged such that he knew or should have known of his injury and not when he later learned of the guilty plea which he contended was when he learned of a pattern of racketeering. Thus, it was proper to dismiss the civil RICO claims by summary judgment.

Like *Rotella*, the civil RICO claim here is barred by the statute of limitations. Even if the court accepted the allegations made in the complaint as true, it is clear the RICO claims are time barred just as the § 1983 claim is barred. Petitioner knew of her injury on October 21, 1998 when her children were taken into protective custody by the state. Moreover, this claim is barred even if the court liberally construes her claim to have accrued as of the order of the state court terminating her parental rights, January 12, 2001. Computing the time period from that date shows that the Complaint was tardy, having been filed on June 5, 2005.

Moreover, despite Petitioner's wide ranging allegations of conspiracy to "use the Michigan foster care system as a 'child for profit' machine," the allegations against these Respondents, Drs. Church, Slovis and Palusci, must be viewed separately. *McCune v. City of Grand Rapids*, 842 F.2d 903, 906 (6th Cir. 1988), approving the holding in *Singleton v. City of New York*, 632 F.2d 185, 192 (2nd Cir.

1980), that "[t]he existence of a conspiracy does not generally postpone accrual of causes of action arising from the conspirators' separate wrongs." Instead, the timeliness of the specific claims brought against each defendant must be separately determined.

Here, as to Dr. Church, the allegations are that she initiated the petition that resulted in the "kidnap" of Petitioner's children on October 21, 1998 and testified at the child custody proceedings. [R. 1 – Complaint ¶ 23 and 30] The latter resulted in the January 21, 2001 Order in which Petitioner's parental rights were terminated. [R. 1 – Complaint ¶ 29] Thus, by any conceivable theory, the Complaint filed on June 6, 2005, is time barred for the reasons stated above.

As to Dr. Slovis, it appears the only allegation against him is that he may have participated in a radiologic study relating to Petitioner or her children and may have testified in the child custody proceedings involving Petitioner. [R. 1 Complaint ¶ 24] Thus, as with Dr. Church, the Complaint is time barred as to him as well.

As to Dr. Palusci, there is no allegation that he was involved in the child custody proceedings at all. However, there is an allegation that he works with Dr. Church at DeVos Children's Hospital [R. 1 Complaint ¶ 47] To the extent this can be read as asserting some relationship to this case, we would note that the last act complained of by Dr. Church was her testimony in the child custody proceedings which, as noted above, resulted in the January 21, 2005 Order terminating Petitioner's parental rights. Thus, the claim against him is time barred for the same reasons noted above.

Finally, the new claim by Petitioner that somehow an agreement she claims she entered into with the State of Michigan social workers somehow saves her case because of the Michigan six-year statute of limitations applicable to a breach of contract action, Mich. Comp. Laws § 600.5807, is not tenable. [Petition, pp. 4, 17] First, the instant Petition is the first time this theory was ever mentioned. Where issues are not raised in or considered by the Court of Appeals below, the Supreme Court will not ordinarily consider them. *Adickes v. S.H. Kress & Company,* 393 U.S. 144, 145 n.2, 90 S. Ct. 1598 (1970). Rather, only in exceptional cases does the Supreme Court review issues not raised and not considered by the Court of Appeals below. *Duignan v. United States,* 274 U.S. 195, 199, 47 S. Ct. 566, 71 L. Ed. 996 (1927).

This is not an exceptional case, nor does this particular issue present a compelling reason for review. First, the "parent/agency agreement" or "case service plan" as it is statutorily known, is a product of the Michigan Probate Code and is defined in Mich. Comp. Laws § 712A.13a(d). It is not a "contract" in the traditional sense of the term as the case service plan is statutorily required at the dispositional phase of a temporary wardship proceeding and may be imposed on a respondent parent without an "agreement." See, Mich. Comp. Laws § 712A.18f(2). Therefore the principles of contract law do not apply. Secondly, it is clear from a fair reading of the Petition and the Complaint that she has not asserted any breach of contract claim against these Respondents, Drs. Church, Slovis or Palusci, or that they had anything to do with some supposed agreement. [R. 1 – Complaint] Thus, her new contention has no bearing on the dismissal of Respondents Church, Palusci and Slovis. That ruling should not be disturbed.

II. THE RICO CLAIMS WERE PROPERLY DISMISSED AS THEY WERE CONCLUSORY AT BEST, IN ADDITION TO BEING UNTIMELY

Leaving aside the untimeliness of her claims, Ms. Banks' Complaint pleads insufficient facts to state a claim upon which relief can be granted and therefore, was properly dismissed pursuant to Fed. R. Civ. P. 12(b)(6).

"The Federal Rules of Civil Procedure do not require a claimant to set out in detail the facts upon which he bases his claim. To the contrary, all the Rules require is a 'short and plain statement of the claim' that will give the Defendant fair notice of what Plaintiff's claim is and the grounds upon which it rests." *Conley v. Gibson,* 355 U.S. 41, 78 S. Ct. 99 (1957). Ms. Banks' Complaint is neither short nor plain. Nevertheless, it failed to give Dr. Slovis, Dr. Church and Dr. Palusci fair notice of the claims against them. In addition to being convoluted, nonsensical and confusing, it states conclusory allegations and legal conclusions without supporting factual allegations. Therefore, the lower courts did not err in concluding that Ms. Banks failed to state a claim upon which relief can be granted.

In order to state a claim under 18 U.S.C. § 1962(b), Plaintiff must sufficiently allege that "Defendants (1) acquired or maintained, (2) through a "pattern of racketeering activity" or the "collection of an unlawful debt," (3) an interest in, or control of an enterprise, (4) engaged in, or the activities of which affect, interstate or foreign commerce." *Advocacy Organization for Patients and Providers v. Auto Club Insurance Association*, 176 F.3d 315 at 321-322 (6th Cir. 1999). The elements of a claim under 18 U.S.C. § 1962(a) are: (1) use or investment of income or proceeds of such income received or derived from, (2) a

pattern of racketeering activity or collection of an unlawful debt, (3) in acquisition of interest in, or the establishment or operation of any enterprise, and (4) engaged in, or the activities of which affect, interstate or foreign commerce. The elements of a claim under 18 U.S.C. § 1962(c) are: (1) conduct or, participate in the conduct of, (2) an enterprise engaged in, or the activities of which affect interstate or foreign commerce, (3) through a pattern of racketeering activity or collection of unlawful debt, and (4) being a person employed by or associated with such an enterprise. 18 U.S.C. § 1962(d) proscribes any conspiracy to violate §§ 1962(a), (b), and (c).

Further, for a RICO violation, a plaintiff must establish a "pattern of racketeering activity." This is defined in 18 U.S.C. § 1961(1) and includes a litany of acts which can constitute such a pattern. Included are numerous crimes under both state and federal law. This means that before, and in addition to, alleging the above elements of the RICO violations themselves, a plaintiff must first sufficiently state the facts that make up the elements of the crimes that are alleged to amount to the pattern of racketeering activity. Essentially, this is establishing a pattern of crimes that constitute an element of the larger RICO offense.

Finally, in order to state a claim under 18 U.S.C. § 1964 and recover damages in a civil action, a plaintiff must allege one of the violations of § 1962, above, and, in addition, allege the additional element that it injured them in business or property.

Ms. Banks' purported claims under 18 U.S.C. § 1962 are contained in Paragraphs 101-107 of Banks' Complaint. [R. 1] Ms. Banks stated that, "Defendants' predicate acts

resulted in severe economic, financial, health and job loss to plaintiff . . . "; "Defendants are members and associates of a 'racketeering enterprise' . . . "; "Defendants met, conspired and engaged in the same pattern and practice . . . to operate the Courts as racketeering enterprise and generate false debts." In addition to these conclusory statements, Banks lists the different crimes that she alleged these Respondents committed as part of the "pattern of racketeering activity." However, she failed to allege facts that would tend to establish the elements of those crimes as predicate acts. Despite Ms. Banks' conclusions that the many named defendants, generally, violated criminal statutes, she states no facts that would tend to support them. Significantly, this is a prerequisite to establishing a violation of § 1962. Therefore, Banks' allegations are insufficient to state a claim for violations of § 1962.

In *Advocacy Organization for Patients and Providers*, the Sixth Circuit considered the issue of the sufficiency of pleadings in a civil RICO claim brought under § 1962(b). In that case, plaintiffs alleged mail and wire fraud, in addition to extortion as the predicate acts for a pattern of racketeering activity. As to the mail and wire fraud claims contained in plaintiffs' complaint, the court said:

> Rule 9(b) of the Federal Rules of Civil Procedure provides that in a complaint alleging fraud, "the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). The purpose of Rule 9(b) is to provide fair notice to the defendant so as to allow him to prepare an informed pleading responsive to the specific allegations of fraud. The Sixth Circuit reads rule 9(b)'s requirements "liberally . . . requiring a plaintiff, at a minimum, to allege the time, place,

> and content of the alleged misrepresentation on which he or she relied; the fraudulent scheme; the fraudulent intent of the defendants; and the injury resulting from the fraud."

Advocacy Organization for Patients and Providers, 176 F.3d at 322 (citations omitted). Other circuits are in agreement with the heightened pleading requirements for RICO claims. See, e.g., *Slaney v. The Intern Amateur Athletic Federation,* 244 F.3d 580 (7th Cir. 2001); *Federal Land Bank of Omaha v. Gibbs,* 809 F.2d 493 (8th Cir. 1987).

Here, Ms. Banks failed to allege the time, date, place and content of the misrepresentations. As described above, that is the minimum required under Rule 9(b) under the Sixth Circuit's reading and the heightened pleading requirements for RICO endorsed by other Circuits. Any allegations of fraud must fail to state a claim against Drs. Slovis, Church and Palusci as to the element of "pattern of racketeering activity." Therefore, Ms. Banks did not sufficiently plead a violation of § 1962.

Finally, Ms. Banks has not shown how these alleged acts of the Defendants have injured her in business or property as required by 18 U.S.C. § 1964. Ms. Banks has made a statement that she has been injured economically, but has failed to allege exactly how the RICO violation injured her in that regard.

The courts are "required to accept only well pleaded facts as true, not the legal conclusions that may be alleged or that may be drawn from the pleaded facts." *Blackburn v. Fisk University*, 443 F.2d 121 at 124 (6th Cir. 1971), citing *L'Orange v. Medical Protective Co.,* 394 F.2d 57 (6th Cir. 1968), and *Sexton v. Barry,* 233 F.2d 220 (6th Cir.

1956). Despite its length, Ms. Banks' Complaint is almost devoid of well-pleaded facts. Rather, Ms. Banks has alleged only legal conclusions in her Complaint. There is a glaring lack of factual allegations relating to basic information that would be known to Ms. Banks such as time, place, person and content. Ms. Banks' Complaint did not allege facts sufficient to support her legal conclusions and it did not fairly apprise Respondents Slovis, Church and Palusci of the claims against them. Ms. Banks' Complaint did not state a claim upon which relief could be granted. As the panel of the Sixth Circuit pointed out in affirming the district court, Ms. Banks made only conclusory allegations of a pattern of racketeering activity that caused injury to her business or property. Under these circumstances, no error was committed by either the district court dismissing Ms. Banks' claim or the Sixth Circuit in affirming the district court.

III. THE DISMISSAL OF THE ENTIRE CASE BY THE DISTRICT COURT ON MOTION BY SOME DEFENDANTS WAS PROPER AND DID NOT AFFORD PETITIONER AN OPPORTUNITY TO FILE A DEFAULT AGAINST RESPONDENTS CHURCH AND PALUSCI.

As noted by the Sixth Circuit in this case, the district court's dismissal of the entire case on motion by less than all the defendants was proper where the basis for the dismissal, statute of limitations, applied equally to all defendants, relying upon *Quinn v. Shirey*, 293 F.3d 315, 325 n.4 (6th Cir. 2002). [Petition, Appendix A, p. 3] Thus, the case was properly dismissed as to Respondents Church, Palusci and Slovis. Further, her argument that she was entitled to a default as to Respondents Church

and Palusci is untenable. Drs. Church and Palusci were granted an extension to file their answer to the complaint to a date after the entire case was dismissed. [R. 20 – July 15, 2005 Order Enlarging Time to Answer Complaint] Their answer to the Complaint was not due until August 3, 2005. The district court dismissed the Complaint with prejudice on July 27, 2005. This was prior to the due date for their response to the Complaint, thus making a response unnecessary. It was not until several months after the Complaint was dismissed that plaintiff first sought to have the clerk enter a default. The clerk properly refused to enter a default against Respondents Church and Palusci by a Notice dated October 4, 2005, because the complaint had already been dismissed by Judgment entered on July 27, 2005. [R. 36] Thus, they were never in default. Once the complaint was dismissed with prejudice, they had no further obligation to submit an answer or file a motion to dismiss the case.

CONCLUSION

WHEREFORE, Respondents, Annamaria Church, Thomas Slovis, and Vincent Palusci, request this honorable court to deny the Petition for Writ of Certiorari.

Respectfully submitted,

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